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No. 511

Supreme Court of the United States

OCTOBER TERM, 1969

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AUGUST 1969

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OPINIONS BELOW

The decision and order of the National Labor Relations Board is not yet reported; it is reprinted in the appendix to this Petition (App. 1a). The decision of the United States Court of Appeals for the Second Circuit is not yet reported; it is reprinted in the appendix to this Petition (App. 15a).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 28, 1969 (App. 35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 2857(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(5) of the National Labor Relations Act, as amended, provides as follows:

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ."

Section 8(a)(1) of the National Labor Relations Act, as amended, provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."

Section 7 of the Act provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other material aid or protection, and shall also have the right to refrain from any or all such activities. . . ."

QUESTIONS PRESENTED

1. Does an employer's duty to bargain in good faith include an obligation to provide an incumbent union with a list of home addresses of nonmembers of the union for use by the union for organizational purposes in order to enhance the union's bargaining power?

2. Is such a list of home addresses presumptively relevant to collective bargaining or contract administration so that no specific showing of relevance is required in order to impose a duty to furnish upon an employer?

3. Was the standard used by the court below in determining adequacy of alternative channels of communication available to the union for communicating with non-members about collective bargaining or contract administration matters consistent with the standard established by this Court in *NLRB* v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956)?

4. Was the application by the court below of the substantial evidence test consistent with *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950)?

STATEMENT

The Prudential Insurance Company of America (herein referred to as Prudential) is engaged in the business of selling and issuing life insurance, health insurance, group insurance and annuity contracts. Prudential does business throughout the United States. The Insurance Workers International Union, AFL-CIO (herein referred to as the Union) is the collective bargaining representative of District Agents (sometimes herein referred to as District Agents, Agents, or bargaining unit employees) employed by the Company in thirty-four states, the District of Columbia, and the City of Toledo, Ohio. As of December 1967, Prudential employed approximately 16,795 District Agents within the bargaining unit. This number has not varied appreciably over the last 10 years.

The Union has been the collective bargaining representative of Prudential's District Agents since 1959,

during which time five consecutive collective bargaining agreements have been negotiated. The present Union succeeded two predecessor unions through merger. Prior to 1959, Prudential bargained collectively with those unions—the National Federation of Insurance Agents' Council and the Insurance Agents' International Union. Between 1949 and 1959 four consecutive collective bargaining agreements were negotiated with these predecessor unions.

Within the area covered by the collective bargaining agreement, Prudential's operations are divided geographically into 478 districts, with a district office located in each district. In 228 districts, Prudential also maintains one or more detached offices, which are administratively related to the district office for the district in which they are located. As of December 1967, Prudential maintained approximately 419 detached offices. The number of district and detached offices has not varied materially since 1959.

The number of District Agents which operate out of each district and detached office varies within the collective bargaining unit, but on the average approximately 19 District Agents report to each district or detached office.

The Union has 178 local organizations in the area encompassed by the collective bargaining agreement, and substantially all of Prudential's district and detached offices within the bargaining unit are within the jurisdiction of some one of the local union organizations. The Union locals have membership meetings monthly, every three months, or less frequently when authorized by the Union's Executive Board. The Union pursues no general practice of inviting or not

inviting nonmember Agents to attend these local union meetings.

District Agents are normally required to report to their district or detached office on Tuesday and Friday of each week at 8:30 a.m. On Tuesdays, the Agents remain at the office for approximately one and one-half to two hours, and on Fridays, the Agents remain at the office for approximately two and one-half to three hours, during which time they work on business records pertaining to their territory and attend meetings.

In addition to the regular twice-a-week reporting schedule, a half-day training session is regularly scheduled for new District Agents during the first year of their employment. New District Agents are trained by or under the supervision of District and Staff Managers according to a program established by Prudential.

Prudential has never had a policy or practice, either through publications, meetings or otherwise, of attempting to impart to or indoctrinate its District Agents with Prudential's labor-management relations policies or philosophy. Managers are instructed not to initiate any discussion of labor-management relations matters with any District Agent. However, managers have authority to advise trainees and Agents of the representative status of the Union, and that they are free to join or not as they wish.

If an Agent inquired as to whether a Union represents Prudential Agents, he would be informed of the representative status of the Union. Moreover, if an Agent requested a copy of the collective bargaining agreement, he would be given one. Prudential normally communicates with its District Agents only at

the district or detached office to which they report. Prudential's various publications are distributed to Agents at the district and detached offices. To facilitate communication, Prudential maintains in its district and detached offices one, and in some cases two, bulletin boards upon which office managers place materials relevant to the Agents' work. But no materials relative to Prudential's position on any labor-management relations matters are placed on any Company bulletin boards.

Under collective bargaining agreements entered into between Prudential and the Union, the latter has been entitled to place bulletin boards in each district and detached office within the collective bargaining unit, to have a grievance committee in each district, and to the check-off of union dues. In addition, District Agents are permitted a specified amount of time off without loss of compensation for union business, and to attend union meetings, and conventions. In each contract negotiation, Prudential and the Union have bargained collectively with respect to Union requests for a union shop or maintenance of membership provision, but no such provision has been included in any of these collective bargaining agreements.

Although every collective bargaining agreement since 1949 has granted the Union the right to place and maintain bulletin boards in every district and detached office within the unit, the Union has elected to exercise this right in only 65 percent of Prudential's offices. Of the 305 district and detached offices in which the Union has not placed a bulletin board, at least 105 of these offices have one or more Agents who are dues paying members of the Union.

In offices where the Union has no Agents on check-off, the Union has the same right to place a bulletin board. The Union may and has utilized such bulletin boards by making mutually convenient arrangements for doing so with Prudential. However, the Union has bulletin boards in only 21 of these offices. In the remaining 200 offices with no Agents on check-off, the Union has made no attempt at communication through the use of bulletin boards.

In offices in which the Union has placed bulletin boards, the boards are approximately 18 inches by 24 inches in size and are located in the room utilized by district agents in the conduct of their work. Union bulletin boards are readily visible and accessible to District Agents.

Under the collective bargaining agreements, the Union has been and is entitled to have in each district a grievance committee consisting of not more than three District Agents. A district may include one or more detached offices at varying distances from each other and the composition of the district grievance committee may be changed by the Union at any time, or from time to time. Thus the composition of the district grievance committee may be changed from office to office within the district as the Union deems necessary or appropriate for the administration of the contract. The designation of district grievance committees or changes therein is solely an internal union matter. Prudential has never challenged the composition of any grievance committee in any district or detached office.

The Union has elected not to designate a grievance committee in any of the 221 district and detached offices

in which there are no Agents on check-off. In offices where there is a grievance committee, during the last nine years a total of approximately 6,617 grievances have been filed by the Union.

As of December 1967, approximately 9,702 District Agents had authorized the check-off of union dues under the applicable collective bargaining agreement. Between 1959 and 1967 the number of District Agents who have authorized the check-off of union dues has increased, as has the number of district and detached offices in which one or more District Agents have authorized the check-off of union dues.

As of December 1967, 87.6 percent of the District Agents within the collective bargaining unit reported to a district or detached office in which one or more Agents had authorized the check-off of union dues.

On several occasions, the Union has distributed literature to Agents around the Company's district and detached offices. The Union has, however, elected not to utilize this method of communication on a regular or frequent basis.

Despite the fact that the Union has a complete mailing list of all District Agents who are members of the Union, the Union uses this mailing list an average of only twice a year, except in the case of the union newspaper which is sent to members monthly. The Union has the names and addresses of approximately 150 nonmember Agents but does not mail either the union newspaper or other communications to these Agents.

At various times in 1960, the Union requested that it be supplied with a list of names and addresses of Agents within the collective bargaining unit. Such a list was purportedly necessary, the Union said, "to enable us to accomplish effectively our responsibilities

as the bargaining agent, and to bargain effectively for our next contract." In reply, Prudential stated that it was against Company policy to furnish any organization a list of employee names and addresses, and that the Union was no exception. Moreover, Prudential indicated that the collective bargaining agreement contained provisions under which the Union had reasonable means of communication with bargaining unit employees.

Subsequent to this request, in 1964-65 the Union instructed its local officials in district and detached offices to assemble a list of nonmember Agents' names and addresses. Although contract negotiations were pending the Union's stated purpose in requesting such a list from its Office Chairmen was not to enable the Union to communicate with nonmembers in connection with collective bargaining or to obtain their preferences on contract terms, but rather to enable the Union to try to enroll these Agents in the Union. In 1965-66 the Union continued to ask local unions to compile and submit lists of nonmember Agents. Again, however, these lists were solicited, not for the purpose of facilitating collective bargaining, but rather because they were considered the "first prerequisite" to a successful organization drive among the Company's nonmember Agents.

When, on August 23, 1967, the Union again requested that Prudential supply a list of names and addresses of Agents within the collective bargaining unit, the Union resurrected its assertion that it wanted the list in order to communicate with Agents in regard to matters relevant to collective bargaining. Prudential again refused to comply with the Union's request.

This refusal led to the decision and order of the National Labor Relations Board issued on November 13,

1968 which was enforced by the United States Court of Appeals for the Second Circuit with Judge Friendly dissenting on May 28, 1969.

REASONS FOR GRANTING THE WRIT

I.

The effect of the Board order that was sustained by the Court of Appeals is to require Prudential to assist the respondent Union in soliciting members from among Prudential's employees in order to strengthen the bargaining position of the Union as against Prudential.

The Board did "not dispute the fact" that the list of names and addresses of nonmembers of the Union which Prudential is required to turn over might be used by the Union "for the purpose of recruiting new members...." (App. 9a n. 11 *infra.*). The evidence that the Union would so use the mailing list is substantial and compelling. Indeed, Judge Friendly, dissenting below, thought it clear on the record that recruitment was the Union's only objective. (App. 32a *infra.*).

To the majority of the Court of Appeals, however, the fact that the Union would use the mailing list to solicit new members was "simply of no moment." (App. 29a *infra.*). Consequently, the court rejected Prudential's request that the Board's order be so written as to limit the Union's use of the mailing list to matters pertaining to collective bargaining and contract administration—the purpose for which the list was ostensibly requested.

Thus, the court below has decided that an employer may be made materially to assist a long-time incumbent union that has no rival for representation rights in sight, to strengthen its bargaining power by turning

over to it an employee mailing list that can and will be used for recruiting new members.

The decision of the Court of Appeals involves an important question of federal law that has not been and should be decided by this Court. The lower court has decided the question in a way, moreover, that is inconsistent with the principles of related decisions of this Court.

The circumstances under which an employer has a duty to assist—by granting access to his property—an organizing union in its effort to obtain representative status were delineated by this Court in *NLRB* v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956). Likewise, the circumstances under which an employer has a duty to assist—by supplying requested information—the representative of his employees in the union's performance of its collective bargaining duties have often been stated by this Court. *See, e.g., NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB* v. *Woolworth Co.*, 352 U.S. 938 (1956). But the question of the circumstances, if any, under which an employer has a duty to assist the union that has represented his employees for many years in its efforts to recruit additional members has never been specifically considered by this Court.

The decision below is that an employer must help a union which for many years has represented his employees without challenge to unionize non-union employees and thereby enhance the union's bargaining power. No support is to be found for that decision in the opinions of this Court on which the Court of Appeals relied.

Unlike the instant case, both decisions of this Court cited by the Court of Appeals on this point—the *Bab-*

cock & Wilcox case and *NLRB* v. *Wyman-Gordon Co.*, 37 U.S. Law Week 4370 (April 23, 1969)—involved access to and use of an employer's property by a union *seeking* representative status. This difference alone is decisive.

Babcock & Wilcox imposes a duty on an employer, in appropriate circumstances, to make his property available to an organizing union for membership solicitation purposes so that his employees may have the opportunity guaranteed them by the Act to be exposed to the union's point of view and thus make an intelligent choice on the question of representation. But once a union has attained a representative status, this purpose of the Act is satisfied, and the employer's duty in this regard is discharged. Nothing in the purpose or policy of the law warrants a continuing invasion of an employer's property interests by a recognized union for the purpose of allowing the union to attempt to strengthen its bargaining power by solicitation of additional members.

The same considerations apply to the *Wyman-Gordon* decision, where it was held that an employer must make employee names and addresses available to unions prior to a representation election. Union possession of a list of names and addresses prior to a representation election serves the purpose of insuring that the employees may exercise a fair, free and informed choice in their selection of a bargaining representative. But nothing in the *Wyman-Gordon* decision suggests that, once the representation question is resolved, it is an unfair labor practice for the employer to refuse further affirmative assistance to the union in its effort to strengthen its bargaining position by recruiting additional members.

The holding of the court below is not only unsupported by the cases upon which it purports to rest, but indeed is basically inconsistent with the pertinent decisions of this Court. The Board concluded that an employer who refuses, among other things, to assist a union to obtain a more powerful bargaining position by increasing its membership violates his duty to bargain in good faith. It directed the employer to desist from his violation and give his aid to the union. The Court of Appeals affirmed. With the sanction of the court, the Board has thus placed its thumb on the scale balancing the relative bargaining power between a union and the employer with respect to substantive matters. This is what this Court admonished the Board not to do in *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965).

In the *American Ship Building* case the Board, acting on the theory that it was entitled to try to strengthen a union in collective bargaining, held unlawful a lockout by an employer that was designed to compel a union to accede to the employer's collective bargaining demands. This Court reversed and said:

> "[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." 380 U.S. 316.

Similarly, the principle of *Scofield* v. *NLRB,* 394 U.S. 423 (1969), stands in opposition to what the Court of Appeals has ruled the Board may do. This Court there said that it could

> "discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." 394 U.S. 433.

In the instant case the collective bargaining agreement between Prudential and the Union dealt specifically with permissible means for the Union to solicit members. It was agreed that Prudential's property and the means of communication made available thereon would not be used for membership solicitation purposes. But the Board and the court below, after weighing the alleged interests of both parties, concluded that the Union should have access to Prudential's property for membership solicitation purposes. Thus the Board is allowed to strike a better bargain for the Union than the Union was able to strike for itself at the bargaining table.

The scope of the decision below requiring affirmative assistance by an employer to enhance a union's bargaining power materially alters the rights and obligations of both employers and unions in a critical area of labor-management relations. This Court should resolve the fundamental issue of whether an employer's duty to bargain in good faith includes an obligation to assist a recognized union in its membership solicitation activities in order to enhance its bargaining power.

II.

The rationale of the Board in issuing its order, and of the court below in sustaining it, was that the mailing list of employees was relevant to the Union's fulfillment of its duties as the bargaining representative of the employees. It was thus an unfair labor practice for the employer to withhold the list. The conclusion of the Court of Appeals that the order could properly be sustained on this ground raises three questions that should be considered by this Court.

1. The Court of Appeals held that no specific showing of relevance on the Union's part was needed—that the mailing list was presumptively relevant to the Union's bargaining duties. That holding represents an unwarranted extension of the doctrine of presumed relevance of information to bargaining duties as developed by other courts of appeals.

2. The lower court's holding that the Union's alternative means of communication with nonmembers were not adequate is inconsistent with this Court's decision in *NLRB* v. *Babcock & Wilcox Corp.*, 351 U.S. 105 (1956).

3. In its review of the record to determine whether substantial evidence underlay the Board's decision, the court below departed from the standard established by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950).

The three questions will be taken up in turn.

A.

The National Labor Relations Act does not expressly impose upon an employer any affirmative duty to make information available to a union. The Act does, however, require "good faith" bargaining. Thus, if the employer possesses, but refuses to supply the union with, information that the union needs in order to perform its collective bargaining duties, the employer has breached his duty to bargain in good faith. A union, however, is not entitled to all of the information it wants for any reason. Rather, the *sine qua non* of the employer's duty is the relevance of the requested information to collective bargaining.

Ordinarily, the union has the burden, as an initial matter, of demonstrating the relevance of the requested information by reference to the circumstances of the case and the use to which the union can and will put the information. However, with respect to certain limited types of information, the courts have developed a presumption of relevance which relieves the union of the necessity of showing relevance in each individual case and which makes an employer's refusal to supply this information a per se violation of his duty to bargain in good faith.

The difference between information which may be deemed presumptively relevant and information the relevance of which must be demonstrated by a union was most clearly articulated by the Third Circuit in *Curtis-Wright Corp.* v. *NLRB,* 347 F.2d 61 (3d Cir. 1965), as follows:

> "[W]age and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as *such data concerns the core of the employer-employee relationship,* a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires." *Id.* at 69. [Emphasis added.]

Other courts of appeals have voiced essentially the same standard. *E.g., Boston Herald-Traveler Corp.* v. *NLRB,* 223 F.2d 58 (1st Cir. 1955).

Since information pertaining to wages or other mandatory subjects of collective bargaining would normally be of no use to a union *except* in connection with col-

lective bargaining or contract administration, the necessary rational connection between a known fact and the fact to be presumed is thus established. *See Morrison* v. *California,* 291 U.S. 82, 88-91 (1934). On the other hand, unlike information pertaining to wages, information which the Union needs only for the purpose of communicating by mail with nonmember employees does not concern "the core of the employer-employee relationship." Such information, rather, pertains to the relationship between employees and the Union and could at most be only indirectly relevant to collective bargaining.[1] Moreover, a union might actually intend to use such information for purposes other than those related to collective bargaining—*i.e.,* as in this case, solicitation of union membership—and thus there is no rational basis for the conclusion that the information is necessarily and presumptively relevant to collective bargaining.

The holding of the court below, by extending a presumption of relevance to information like that involved in this case, in effect disposes of the relevance requirement altogether. It thus cuts the embryonic cord between the statutory duty to bargain in good faith and the duty to provide information, and establishes the latter as a duty independent of any statutory predicate. This approach is clearly inconsistent with the holdings of other circuits and presents to this Court a conflict of substantial importance.

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[1] There is a substantial question whether "indirect relevance" is sufficient as a matter of law to require an employer, as a part of his duty to bargain in good faith, to supply a list of names and addresses of nonmembers of the union.

B.

In holding that the mailing list was actually needed because the Union lacked alternative channels of communication on matters pertaining to collective bargaining and contract administration, the court below attempted unsuccessfully to follow the alternative-channels-of-communication rationale of *NLRB* v. *Babcock & Wilcox,* 351 U.S. 105 (1956). But its standard for determining the adequacy of alternative channels of communication was totally different from the controlling standard established by this Court in that case.[2]

As this Court noted in *NLRB* v. *United Steelworkers (NuTone),* 357 U.S. 357 (1958), unions are not necessarily entitled to "the use of every possible means of reaching the minds of individual workers." In *Babcock & Wilcox,* this Court held that an employer is not required to grant a union access to his property unless the employees are "beyond the reach of reasonable union efforts to communicate with them" by other methods. No such duty exists if "the usual methods of imparting information are available."

The "usual" methods of communication which this Court deemed adequate in *Babcock & Wilcox* included the distribution of literature to "some of the employees"; other contacts with "some of the employees"; the distribution of literature by mail to over 100 employees (approximately 20 percent of the employees in the unit); and advertised union meetings. *See* 351 U.S. at 107 n.1 and 111.

In the instant case, not only were the "usual" methods of communication available, but indeed addi-

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[2] Judge Friendly's dissenting opinion below (App. 31a-32a *infra*) brings into sharp focus this error in the decision of the lower Court.

tional channels of communication were agreed upon by the parties in their collective bargaining contract. There is no evidence in the record to suggest why the Union, except for its own inertia, could not utilize its far flung local organizations to distribute literature outside most if not all of the Company's offices. By its own admission, the Union has used this "usual" method of communication only infrequently.

Likewise, the union already has a mailing list of approximately 57 percent of the Agents in the unit—an existing channel of communication which again the Union has not used although it now claims it cannot fulfill its statutory duties without a complete list.

The Union holds regular membership meetings throughout the bargaining unit, a channel of communication which could effectively be used to reach nonmembers if the Union invited them.

As the court below conceded, personal contacts between members and nonmembers on matters pertaining to the Union are an effective channel of communication in offices to which at least 87.6 percent of the Agents report.

On top of this, by contract the Union has the right to have grievance committees and to maintain a bulletin board[3] in every Prudential office.

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[3] The right to have a bulletin board in every office alone should be sufficient to dispel any claim that the Union lacks alternative channels of communication. In Decaturville Sportswear Co. v. NLRB, 70 L.R.R.M. 2472 (6th Cir. 1969), the court refused to enforce that portion of a Board order requiring the employer to supply a list of employee names and addresses because "opportunity for reasonable access to the employees" was given in other provisions of the order, one of which granted the Union access to the Company's bulletin boards.

A comparison of the channels of communication available to the union in *Babcock & Wilcox*—which were held to be adequate—with the channels of communication available to the Union in the instant case—which were held to be inadequate—compels the conclusion that the Board and the court below applied a standard far different from that established by this Court.

C.

In *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1950), this Court held that:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

This is a case where the standard, if not misapprehended, has at least been grossly misapplied. The Board based important findings on no evidence at all—on totally unsubstantiated speculation, surmise and inference. The Court of Appeals nevertheless sustained the Board's order.

Most notably, there is no substantial evidence on the record as a whole to support the finding that the home addresses were sought by the Union for the purpose of communicating with employees about collective bargaining matters. All of the evidence points to a contrary conclusion. This was the ground of Judge Friendly's dissent in which he said that "[W]e engage in self-deception when we proceed on the basis that the

Union's real objective is what its request of Prudential professed." (App. 32a *infra.*).

Although the Union asserted, and the Board and lower court found, that the home addresses were requested for the purpose of communicating with employees about collective bargaining matters, there is *no evidence* to support this assertion, apart from the Union's own self-serving statements. Indeed, all of the evidence points to a contrary conclusion. The Union has always had a mailing list of from 55 to 57 percent of the employees in the unit, but the record does not show that it has ever used this list to communicate about collective bargaining matters. In the past the Union has tried to obtain nonmember names and addresses through its own members, and the Union has explicitly stated it desired this information in order to solicit union membership among these employees and thus strengthen its bargaining position. And finally the Union vigorously opposed Prudential's suggestion that the Union's use of the mailing list be limited to matters pertaining to collective bargaining or contract administration.

The finding that the alternative channels of communication, available to the Union through the contract or otherwise, were inadequate is also based on speculation. In its decision, the Board noted that "neither the grievance procedure nor the posting provisions [of the collective bargaining agreement] allow the Union to *communicate generally* with unit employees." (Emphasis added.) The Board apparently predicated this finding on the fact that the collective bargaining agreement regulates to some extent the kinds of materials that may be posted on the bulletin board. However, the ability of the Union to "com-

municate generally'' was completely immaterial to this case. The issue, rather, was whether the Union could communicate about collective bargaining and contract administration matters. But there is *not a shred of evidence* that the Union ever attempted to utilize the bulletin boards for conveying information regarding collective bargaining or contract administration matters or that Prudential has ever construed the contract as prohibiting the posting of matters pertaining to collective bargaining or, more important, that any arbitrator has ever sustained any such interpretation of the contract.

If the Board wished to rely on a notion of inadequacy of bulletin boards (or of grievance committees) as a means of communication regarding collective bargaining or contract administration matters, it had the burden of proving, at the very least, that the Union had attempted to utilize those means of communication and had been prevented from doing so because of a narrow interpretation of the contract by Prudential, or had been otherwise unable to do so. ***But no such proof was offered.***[4]

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[4] There was likewise no substantial evidence to support the Board's statements regarding the ''unsuccessful'' efforts to communicate through handbilling, or the court's statements regarding the inadequacy of Union meetings as a means of communication.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 1969

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 5-CA-3907

PRUDENTIAL INSURANCE COMPANY

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

Decision and Order

Upon a charge filed on September 19, 1967,[1] by Insurance Workers International Union, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint and notice of hearing, dated November 27, against Prudential Insurance Company, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of charge and complaint and notice of hearing were duly served upon Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that the Union is the exclusive bargaining representative of Respondent's insurance agents in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act,[2] and that

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[1] Unless otherwise indicated, all events occurred in 1967.

[2] The complaint describes the appropriate unit as follows: all district agents employed or hereafter to be employed by Respondent in districts whose district offices are located in the States of Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New

Respondent and the Union are parties to a collective-bargaining agreement, effective from on or about September 26. The complaint further alleges that on or about August 27, the Union requested that Respondent furnish it with a list of the names and addresses of all bargaining unit employees in order to permit the Union to bargain intelligently with Respondent and to perform its duties and functions with respect to the administration of the collective-bargaining agreement, and that at all times material, Respondent has refused to honor this request, and by such conduct has violated Section 8(a)(5) and (1) of the Act.

On December 7, Respondent duly filed its answer, admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

On February 28, 1968, all parties to this proceeding entered into a stipulation of facts in lieu of hearing and stipulated that the proceeding be transferred directly to the Board for findings of fact, conclusions of law, and issuance of a Decision and Order based thereon. In the stipulation, the parties agreed that the stipulation of facts and the exhibits attached thereto, including the charge, complaint, and notice of hearing, and Respondent's answer would constitute the entire record in this case. The parties further stipulated that they waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, the issuance of a Trial Examiner's Decision, and the right to request oral argument before the Board. The parties also expressly reserved the right to file briefs with the Board.

Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia, the District of Columbia, and the city of Toledo, Ohio, excluding managers, staff managers, agencies' service representatives, office supervisors, assistant office supervisors, clerks, persons employed in a supervisory capacity, and all other supervisors as defined in the Act.

On February 29, 1968, the Board approved the stipulation, accepted the transfer of the case, and set March 29, 1968 as the due date for briefs and April 15, 1968 as the due date for reply briefs. Briefs were timely filed by Respondent, the General Counsel, and the Union. A reply brief was also filed by Respondent in timely fashion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the basis of the stipulation and the entire record in this case, including the briefs, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is a New Jersey corporation with offices in various States of the United States and the District of Columbia, where it is engaged in the business of selling and issuing life insurance, health insurance, group insurance, and annuity contracts. During the past 12 months, a representative period, Respondent received as premiums on insurance and annuity contracts a sum well in excess of $1,000,000, of which well in excess of $50,000 in premiums were received from outside the State of New Jersey, and paid out on claims under said contracts a sum exceeding $500,000,000, of which well in excess of $50,000 in claims were paid to customers outside the State of New Jersey.

We find, in accordance with the stipulation, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. The Labor Organization Involved

The parties agree and we find that Insurance Workers International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The sole issue raised in this proceeding is whether, as alleged in the complaint, Respondent violated Section 8(a)(5) of the Act by refusing on August 23, and thereafter, to honor the Union's request for a list containing the names and addresses of all bargaining unit employees. A determination of this issue must of necessity be based upon an examination of the relevancy of the Union's request and the context in which it was made.

As indicated by the stipulated facts, a bargaining relationship has existed between the parties since 1959, when Respondent recognized the Union as the exclusive representative of its district insurance agents employed in 34 States, the District of Columbia, and the city of Toledo, Ohio. During the period in question, the parties have entered into successive collective-bargaining agreements, the most recent of which was executed on September 25, 1967, and is effective until September 29, 1969. Although these collective-bargaining agreements have provided for the checkoff of union dues, no union security or maintenance of membership provisions have been agreed upon by the parties.

The broad scope of the bargaining unit is best demonstrated by the fact that the unit covers approximately 16,795 district agents employed at Respondent's 478 district offices and 419 detached offices throughout the United States. Of the 16,795 unit employees, approximately 9,702 have executed dues checkoff authorizations in favor of the Union and are considered by the parties to be members of the Union. There are no checkoff authorizations in effect at 221 of Respondent's offices, however, and it would appear

that the Union does not have any members employed at these locations.

There is also evidence of considerable turnover among unit employees. For example in the past year, Respondent hired 4,315 new agents, while 4,241 agents were either terminated or left Respondent's employ voluntarily. During the same period, 2,455 new check-off authorizations were executed, while 2,352 were cancelled as a result of transfers, terminations, or voluntary revocations. With respect to checkoff authorizations, the Respondent provides the Union with a monthly statement of the names and office location of employees who have been added to or deleted from the Respondent's checkoff authorization list, and in addition, Respondent supplies the Union with a semi-annual report listing the names and location of all employees who have cancelled their authorizations during this period.

The Union's August 23 request for the names and addresses of all bargaining unit employees was presented to Respondent during the negotiations which resulted in the current collective-bargaining agreement.[3] In making this request, the Union stated that such information was necessary and relevant to the performance and fulfillment of its duties and functions as bargaining representative. In explanation of its position, the Union advised Respondent that under existing conditions it had no effective way of communicating with bargaining unit employees,[4] and as a consequence, it was unable to advise employees concerning contract benefits, or enlist their support in policing and enforcing the collective-bargaining agreement. The Union further took the position that the information requested was particularly relevant at a time when the parties were engaged in bargaining negotiations because

[3] The Union has also sought such information at various times since 1960.

[4] In addition to the 9,702 employees on checkoff, the Union has the names and addresses of 150 nonmember employees.

it would permit the Union to poll unit employees as to their preferences and priorities on various contract proposals. Respondent has refused at all times since August 23, to supply the information requested. It has asserted as a basis for its refusal its policy of refusing to furnish employee lists to any organization. It has also contended that the information sought is not necessary and relevant for purposes of bargaining, and that the collective-bargaining agreement currently in force contains provisions under which the Union is afforded reasonable means of communication with unit employees.

On the basis of the evidence before us, we are convinced that the information the Union requested from Respondent was necessary and relevant to collective bargaining and the administration of the collective-bargaining agreement. As we have previously stated,[5] the statutory duty of fair representation requires that the bargaining agent extend representation to nonunion unit employees as well as to union members, and where as here, the bargaining representative has no effective means of communicating with a substantial number of unit employees, it cannot properly meet its statutory obligations under the Act.

The Union's lack of any effective means of communication with nonunion unit employees is amply demonstrated in this record. As previously mentioned, there is no union security or maintenance of membership provision in the collective-bargaining agreement in effect between Respondent and the Union, and at the present time less than 60 percent of the bargaining unit employees are members of the Union. While a relatively low rate of union membership in an established bargaining unit can result from circum-

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[5] *Standard Oil Company of California, Western Operations, Inc.*, 166 NLRB No. 45; enfd. F.2d , (C.A. 9), 69 LRRM 2014. (Member Zagoria, dissenting) Though dissenting in *Standard Oil, supra,* based on the particular facts there presented, Member Zagoria joins his colleagues in finding a violation in the instant case, since the relevancy of the requested information for collective-bargaining purposes has clearly been established.

stances unrelated to difficulties in communication, the broad scope of the unit here involved and the high turnover among unit employees lends substance to the Union's claim that the low rate of union membership is a reflection of the difficulties it has experienced in attempting to communicate with unit employees. In this connection, we deem it significant that the bargaining unit involved in this proceeding is nationwide in coverage, including over 16,000 agents employed at 897 locations. In addition, we are mindful of the fact that in the course of its operations, Respondent experiences a 25 percent turnover per year among these unit employees.

While the foregoing demonstrates the inherent problems encountered in communicating with employees in a unit of the size, scope, and fluctuations involved here, such a situation does not in and of itself establish that the bargaining agent has no effective means of communicating with unit employees. Obviously, the parties may agree upon various channels of communication with employees which would obviate the necessity of obtaining from the employer the names and home addresses of unit employees. However, contrary to the contention of Respondent, we do not agree that the parties' existing collective-bargaining agreement provides adequate channels of communication between the Union and the bargaining unit employees. Under the terms of this agreement, the Union is permitted to establish a grievance committee in each of Respondent's offices. Also under the contract, the Union has been granted the right to post certain notices on office bulletin boards made available for this purpose. However, neither the grievance procedures nor the posting provisions allow the Union to communicate generally with unit employees. There is no contractual authorization for contact between the grievance committee and employees, except in those instances where the processing of a grievance is involved.[6] Likewise,

[6] At 221 of Respondent's offices the Union has no grievance committee, apparently because the Union has no members employed at these locations.

although the Union has been granted posting rights, the collective-bargaining agreement limits such posting to announcements of general interest to its members. The Union is expressly prohibited from using the bulletin boards to distribute materials of any kind, and the Respondent reserves the right to remove any materials from the Union bulletin boards which are not authorized under the terms of the contract.[7]

It is also quite apparent that the Union does not have reasonable access to unit employees at the place of their employment. The nature of an agent's duties is such that only a very small percentage of his time is spent in the office.[8] Moreover under Article XIX of the collective-bargaining agreement, the Union is expressly prohibited from soliciting for union membership; collecting dues; distributing union material, circulars, or literature of any kind; or conducting other union business or activities in Respondent's offices.[9] These circumstances lead us to conclude that any effective communications between the Union and the unit employees must of necessity be conducted, if at all, at places other than Respondent's offices, and that due to the size and geographic scope of the unit, communications by mail to employees at their homes[10]

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[7] At 335 of Respondent's offices no union notices are posted, apparently because few, if any, members are employed at these locations.

[8] As a general rule, agents are required to report to their offices only for meetings which are conducted on Tuesday and Friday mornings.

[9] In the past, the Union has made infrequent attempts at handbilling outside Respondent's offices which have proved to be unsuccessful.

[10] Article XIX of the collective-bargaining agreement would seemingly bar union mailings to employees at their offices, and due to this prohibition, little significance can be given to the fact that Respondent supplies the Union with the office addresses of those employees who have effected changes in their checkoff authorization.

may very well be the only feasible means available for effecting such contact. In any event, it was the lack of an effective means of communication with employees which prompted the Union to request that Respondent supply the names and home addresses of all bargaining unit employees. In making this request, the Union indicated to Respondent the reasons it considered this information necessary, and the purposes for which the information would be utilized. In substance, the Union advised Respondent it intended to use this information in order to solicit the employees' views on contract proposals and preferences, inform the employees concerning contract benefits, and encourage employee participation in the policing and enforcing of the collective-bargaining agreement. Certainly such purposes must be considered relevant to collective bargaining and to the administration of the collective-bargaining agreement.[11]

Accordingly, in view of the foregoing and the entire record, we find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing on August 27, and thereafter, to furnish the Union with a list of the names and addresses of all bargaining unit employees.[12]

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[11] While we do not dispute the fact that the Union may also use the information obtained for the purpose of recruiting new members, this in no way detracts from our finding that the information is necessary and relevant for the purposes of collective bargaining and the administration of the collective-bargaining agreement.

[12] The Charging Party contends that in addition to the initial list of names and addresses of unit employees, Respondent should be required twice-monthly to notify the Union as to any changes which have occurred in the list. The Charging Party argues that such supplemental information is essential due to rapid turnover among Respondent's employees. Although Respondent has not taken a specific position on this question, we note that with respect to checkoff authorizations which involve a similar problem, the parties have seemingly reached a satisfactory accommodation by

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Conclusions of Law

1. Prudential Insurance Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All district agents employed or hereafter to be employed by Respondent in districts whose district offices are located in the States of Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia, the District of Columbia, and the city of Toledo, Ohio, excluding managers, staff managers, agencies' service representatives, office supervisors, assistant office supervisors, clerks, persons employed in a supervisory capacity, and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

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agreeing that information of this nature be made available on a monthly and semiannual basis. Accordingly as the record demonstrates the necessity for such supplemental information, but fails to justify its production on a twice-monthly basis, we shall require that Respondent notify the Union monthly as to any changes which have occurred with respect to the names and addresses of bargaining unit employees.

4. Since 1959, and continuing to date, the above-named labor organization has been and is the bargaining representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 27, 1967, and at all times thereafter, to furnish the above-named organization, upon request, a list of the names and home addresses of all employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Prudential Insurance Company, its officers, agents, successors, and assigns, shall take the action set forth below:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Insurance Workers International Union, AFL-CIO, by refusing to furnish it, upon request, with the names and home addresses of all employees in the following appropriate unit:

> All district agents employed or hereafter to be employed by Respondent in districts whose district

offices are located in the States of Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia, the District of Columbia, and the city of Toledo, Ohio, excluding managers, staff managers, agencies' service representatives, office supervisors, assistant office supervisors, clerks, persons employed in a supervisory capacity, and all other supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Bargain collectively with the above-named labor organization by furnishing it, upon request, with a list of the names and home addresses of all employees in the appropriate unit, and each month thereafter notify the said labor organization, in writing, of any changes which have occurred with respect to the names and home addresses of unit employees.

(b) Post at all of its offices throughout the United States, copies of the attached notice marked "Appendix".[13] Copies of said notice, on forms provided by the Regional Director for Region 5, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 days thereafter, in conspicuous

[13] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 5, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman
JOHN H. FANNING, Member
SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NATIONAL LABOR RELATIONS ACT
(as amended)

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Insurance Workers International Union, AFL-CIO, by refusing to furnish it, upon request, with the names and home addresses of all employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL bargain collectively with the above-named labor organization by furnishing it, upon request, with a list of the names and home addresses of all employees in the appropriate unit, and each month thereafter, notify the said labor organization, in writing, of any changes which have occurred with respect to the names and home addresses of unit employees.

The appropriate unit is:

All district agents employed or hereafter to be employed by Respondent in districts whose district offices are located in the States of Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia, the District of Columbia, and the city of Toledo, Ohio, excluding managers, staff managers, agencies' service representatives, office supervisors, assistant office supervisors, clerks, persons employed in a supervisory capacity, and all other supervisors as defined in the Act.

PRUDENTIAL INSURANCE COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6th Floor, 707 North Calvert Street, Baltimore, Maryland, 21202. Telephone 301-962-2822.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 488-89—September Term, 1968.
(Argued April 10, 1969 Decided May 2, 1969.)
Docket Nos. 32936, 33069

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.

Before:
FRIENDLY, KAUFMAN and HAYS, *Circuit Judges.*

Petition by employer to review and set aside Board order to comply with Union request for a list of the names and addresses of the employees in the unit it represents, and cross-petition by the Board for enforcement. Petition for review denied, and cross-petition for enforcement granted.

JEROME ACKERMAN, Washington, D. C. (Thomas R. Haggard, Covington & Burling, Washington, D. C., on the brief), *for petitioner.*

PAUL J. SPIELBERG (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel,

Robert E. Williams, National Labor Relations Board, on the brief), *for respondent.*

ISAAC N. GRONER, Cole and Groner, Washington, D. C., *for intervenor.*

KAUFMAN, *Circuit Judge:*

We are called upon to determine whether the circumstances present here require the employer to comply with the union's request for a list of the names and addresses of its employees in a bargaining unit of which the union is the exclusive bargaining representative.

I.

The Prudential Insurance Company of America (hereinafter Prudential) is engaged in the business of selling and issuing insurance and annuity contracts throughout the United States. The Insurance Workers International Union, AFL-CIO (hereinafter the Union), is the collective bargaining representative of Prudential's District Agents within an extensive bargaining unit we shall shortly describe. On September 19, 1967, the Union filed its charge with the Board stating that by refusing to supply it with a list of the names and addresses of the district agents in the bargaining unit it represented, Prudential had committed unfair labor practices in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act. Thereupon, the Board issued a complaint and notice of hearing charging Prudential with refusing to bargain in good faith. In its answer, Prudential admitted refusing to supply the requested list, but denied that this action constituted an unfair labor practice.

Subsequently, the parties entered into a stipulation setting forth the relevant facts and waiving a hearing,

a Trial Examiner's decision, the filing of exceptions, and oral argument before the Board. The Board approved the stipulation and accepted transfer of the case for findings of fact, conclusions of law and the issuance of a decision and order based thereon. After all parties filed briefs, the Board on November 13, 1968, determined that Prudential's refusal to furnish the Union with the requested list constituted an unfair labor practice within the meaning of §§8(a)(5) and (1) of the Act, and ordered Prudential to furnish the Union with such a list upon request. Prudential petitions this Court to review and set aside the order, and the Board cross-petitions for enforcement.[1] The Union has intervened on the side of the Board. For the reasons set forth below, we deny Prudential's petition for review, and grant the Board's cross-petition for enforcement.

II.

Prudential has recognized the Union as the exclusive bargaining representative of its district agents within the bargaining unit since 1959, and the two have entered into successive collective bargaining agreements since that time. The most recent of these agreements was executed on September 25, 1967, and will remain in effect until September 29, 1969.

The bargaining unit of Prudential district agents represented by the Union, and covered by the agreement, is extraordinary in every respect. As of the end of 1967,[2] the year the Union filed its charge, the unit consisted of approximately 16,795 district agents employed by Prudential in thirty-four states plus the District of Columbia

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[1] The court's jurisdiction to consider these petitions is derived from § 10 of the Act.

[2] All of the following statistics are as of that date unless otherwise specified.

and the city of Toledo, Ohio.[3] For administrative purposes, Prudential has divided the operations of its agents within this area into 478 districts, with a district office located in each. Additionally, in 228 of these districts Prudential maintains one or more "detached" offices, which are administratively related to the district office of the district in which they are located; in all, there are 419 such detached offices.

Each of the more than 16,000 district agents within the unit is assigned to one of these 897 district or detached offices maintained by Prudential across the United States. The maximum number of agents assigned to the largest district office is forty-seven, the maximum number assigned to the smallest detached office is four. Approximately 90% of these agents are required by Prudential to report to the office to which they are assigned on Tuesday mornings for 1½ to 2 hours and on Friday mornings for 2½ to 3 hours for meetings; the remainder report less frequently because of difficulties in traveling from their place of work to their district or detached office.[4] The agents all spend the rest of their time working individually in the field.

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[3] The 34 states are: Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia.

This unit has been stipulated by the parties to be appropriate for purposes of collective bargaining.

[4] Approximately 90.4% of the agents report to their offices twice a week as described above; another 7.6% report only to the Friday meetings; 0.6% attend meetings twice a month; 0.8% attend meetings once a month; and 0.6% attend only when specifically requested to do so. Each agent maintains a desk at the office to which he is assigned, which he is free to utilize at other times. In the first year of their employ, agents are additionally required to attend weekly training sessions at the office.

Although the Union has sought a security clause in each negotiation for a new collective bargaining agreement with Prudential, no such provision has ever been included in any of their agreements. In fact, only about 9,702 of the 16,795 agents in the unit, or 57.4%, are Union members, a very slight increase from the 55.7% membership in 1959 when the Union was first recognized as the agents' bargaining representative. Moreover, the distribution of Union members throughout the unit is highly uneven; in fact, 221 of the district and detached offices, to which approximately 2,243 district agents are assigned, have no Union members.

In addition, the rate of turnover of district agents within the bargaining unit is about 25% per year. In 1967, for example, Prudential hired approximately 4,315 new district agents, while 4,241 other agents were terminated. The Union experiences a similar annual turnover in the composition of its membership; in 1967, it gained approximately 2,455 new members, while losing approximately 2,352 of its old membership.

In contrast to the size of Prudential and the extensiveness of this bargaining unit, the Union is relatively small. It has 178 local union organizations in the area encompassed by the bargaining unit. Substantially all of Prudential's district and detached offices in the unit are within the jurisdiction of one of these local unions, which also represent the employees of other insurance companies as well as Prudential agents. The Union employs only ten full time organizers, all of whom have, since 1965, been engaged in activities unrelated to Prudential.

III.

At various times since its recognition in 1959, the Union has orally requested that Prudential supply it with a list of the names and addresses of the district agents in the bargaining unit. In 1960, it submitted a similar request in writing, explaining: "Such a list is necessary to enable

us to accomplish effectively our responsibilities as the bargaining agent, and to bargain effectively for our next contract. There is no practicable way to communicate with these employees other than by mail, because of the geographical expanse of the collective bargaining unit." Prudential has consistently refused to comply. Although at various times the Union attempted to obtain the names and addresses of the nonmember agents in the unit through its members, these efforts have been unsuccessful.

Accordingly, on August 23, 1967, the Union's vice president wrote Prudential again requesting that it furnish the list, and urging that such information was "necessary and relevant to the Union's performance and fulfillment of its statutory functions and duties as collective bargaining represntative of all these employees." The letter went on to explain that because of the nature of the unit,

> . . . without such a list, the Union cannot advise all Agents covered by the Agreement as to the benefits offered by the Agreement, cannot gain from them the information and participation necessary and relevant to police and enforce the Agreement throughout the unit or the adherence and support necessary for their representation, or, in general, cannot in any effective manner communicate with the District Agents who are the beneficiaries of its statutory obligations as collective bargaining representative.
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> . . . [T]his information is, additionally required and relevant at the present time, when the Union is engaged in collective bargaining with the Company for a new Agreement; and should thus be in a position to inform all the employees represented by it and governed by the Agreement as to the course of the negotiations, and to solicit their understanding and participation in the bargaining process, including their well informed consideration and action upon any proposed new Agreement. . . .

Again, Prudential refused the request, claiming that its policy was not to disclose such information to any organization for any purpose. Apparently realizing that further requests to Prudential would be equally futile, the Union sought aid from the Board by instituting the unfair labor practice proceeding now before us for review.

IV.

Since the Union has acknowledged in its stipulation that the names and addresses of all the district agents within the unit who are Union members are in its possession, the real bone of contention is whether Prudential is obligated upon request to supply it with similar information as to the agents within the unit who are not Union members.

It is now beyond question that the duty to bargain in good faith imposed upon the employer by § 8(a)(5) includes an obligation to provide the employees' statutory bargaining representative with information that is necessary and relevant to the proper performance of its duties. E.g., *N. L. R. B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Fafnir Bearing Co.* v. *N. L. R. B.*, 362 F. 2d 716 (2d Cir. 1966). And this obligation applies with as much force to information needed by the Union for the effective administration of a collective bargaining agreement already in force as to information relevant in the negotiation of a new contract. *N. L. R. B.* v. *Acme Industrial Co., supra; Fafnir Bearing Co.* v. *N. L. R. B., supra.* Based upon the facts stipulated by the parties, the Board found that the information requested by the Union met these standards of necessity and relevance; Prudential claims both determinations were erroneous.

A. *Necessity*

Prudential argues with fervor that the Union has no need for the list because it has adequate alternative means

of communicating with all the agents in the unit, non-members as well as members. In support of this argument, Prudential suggests four such alternatives open to the Union: bulletin boards, grievance committees, hand-distribution communication, and union meetings. We shall consider them in that order.

1. *Bulletin Boards.* Under the bargaining agreement currently in effect, and under each of the past agreements, the Union is permitted to maintain a bulletin board for the posting of appropriate materials in each of the 897 district and detached offices in the bargaining unit. The Union actually maintains bulletin boards in 592 of these offices; and in the 21 such offices where none of the district agents is a Union member, Prudential has made arrangements enabling the Union to post its notices. Prudential argues that since virtually all of the district agents are required to report to their district offices at least once or twice a week for meetings, these bulletin boards provide the Union with a reasonably adequate means of communicating with the agents on matters relevant to the performance of its duty as their bargaining representative.

We must agree with the Board that such bulletin boards are in this case inadequate. In addition to restricting to some degree the substantive nature of the material the Union may post and reserving to Prudential the right to remove any unauthorized notices, the collective bargaining agreement expressly prohibits the use of these bulletin boards "to distribute material of any kind."[5] As a result,

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[5] The agreement provides:

Article XVIII—Bulletin Boards

1. During the period of this Agreement the Employer will permit the Union, . . . to maintain a bulletin board of moderate size, . . . in each of the Employer's district and detached offices

the boards are not adequate to communicate to the agents any information too lengthy or complex to be read quickly but which must more appropriately be studied for a period of time, or to poll the agents or solicit their opinions about bargaining objectives, contract administration, or other related matters. Furthermore, the nature of the agents' work substantially reduces the utility of office bulletin boards as a means of communication. Since almost all the agents are required to be in their offices for only a few hours a week (and the remainder report even less often), and their time there is taken up with company meetings, it is highly probable that many employees will not see a posted Union notice at all. Moreover, because the agents spend the rest of their time working alone, there is little likelihood they

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within the unit . . ., provided . . . that the notices and announcements to be posted thereon shall be restricted to:

a. Notices of union recreational and social affairs.

b. Notices of union elections and the results thereof.

c. Notices of union appointments.

d. Notices of union meetings, with brief reference to the purpose thereof.

e. Notices, documents, or other material authorized by the International Union, . . . provided that such notices, documents and other material are general in nature and of interest to the Agents in the said area, and provided further that a copy of each such authorized posting is sent to the Employer at the same time it is transmitted from the International Union office.

2. The bulletin board shall not be used by the Union or its members to distribute material of any kind.

3. The Union agrees that the grievance committee will, upon the request of the Employer, remove promptly from the bulletin board any notices, announcements or other material which violates any of the provisions of this Article. If the grievance committee fails to remove the material before the next reporting day the Employer may do so.

will learn of Union news from their co-workers, as might be expected in the case of employees working together in close proximity.

2. *Grievance Committees.* The collective bargaining agreement permits the Union to establish one grievance committee, composed of not more than three district agents, in each district. Such committees, Prudential claims are "the normal channel of communication between a union and employees" with regard to matters of contract administration. Without expressing any opinion on the adequacy of grievance committees in an ordinary employer-union relationship, we must agree with the Board that in this extraordinary bargaining unit these grievance committees are insufficient for the purpose suggested by Prudential. The Union has established no grievance committee in the 221 district and detached offices where none of the agents is a Union member because, it explains, it has been unable to do so. Moreover, the contract permitting the Union to establish such committees does not authorize them to have any contact with the agents in the district except for the purpose of processing individual grievances.

3. *Hand-Distribution Communication.* Prudential suggests that since a relatively small number of agents are attached to each of its district and detached offices within the unit, hand distribution of messages could be accomplished in a short time, and therefore provides a "by no means impractical" method of communication for the Union. We believe, on the contrary, that the Board was entirely justified in finding hand distribution to be a highly impracticable route for this relatively small union to travel in attempting to communicate with the well over 16,000 agents it represents.

To follow Prudential's suggested technique, the Union would be required to post at least one representative at each of 897 Prudential offices in order to effect such a distribution. Also, we cannot ignore the fact that the

collective bargaining agreement expressly prohibits the Union from distributing any material or conducting any other Union activities within Prudential's offices.[6] And well over half of these offices are located in buildings having other tenants and no separate entrance for Prudential employees.[7] In addition, in almost half of its offices, Prudential has no separate parking lot. Given these physical obstacles, we believe it would be well nigh impossible for the Union to reach all the agents within the unit by means of hand distribution of its communications.

4. *Union Meetings.* Prudential insists that since the Union holds regular meetings for its members,[8] it could then communicate with nonmember agents within the unit. We believe, however, that there was substantial evidence from which the Board could conclude that this suggestion was anything but pragmatic. In 1967, 7,093 of the 16,795 agents within the unit were not Union members, and many of them were assigned to offices having no Union members. Unless the Union would be able to persuade these nonmembers to travel large distances to attend its regularly scheduled meetings, which seems highly unlikely, it would

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[6] The agreement provides:

> Article XIX—Union and Employer Activities
>
> 1. The Union agrees that neither the Union nor its members will, in the Employer's offices, solicit for union membership, or collect dues, distribute union material, circulars, or literature of any kind, or conduct other union business or activities in said offices.

[7] Of Prudential's 897 offices within the unit, 362 are located in buildings in which it is the sole tenant, and only 96 others are in buildings having a separate outside entrance for its employees.

[8] The Union's local organizations hold membership meetings monthly, every three months, or less frequently when so authorized by the International's Executive Board.

have to conduct many special meetings to reach them—an infeasible undertaking for this Union.

Prudential lastly urges that even if each of these methods of communication, considered separately, contains some inherent limitations or defects, in the aggregate, they do provide a reasonably effective means of communicating with all the agents within the unit who are "even mildly interested in being reached." This argument, similarly is without merit. Since each of the suggested methods is totally deficient in achieving the objective of reaching the nonmember agents, their aggregation cannot cure the defect. In addition to the problems caused by the vast geographic dispersion of the unit and the nature of these agents' work habits, which afford little opportunity for communication among them, the Union also must cope with the extraordinary high rate of turnover of membership in the unit. Since Prudential does not customarily advise its new agents about the Union unless they specifically inquire, many new agents may not even be aware that there is a union representing them, or that it has negotiated a collective bargaining agreement in their behalf, or that it is prepared to ensure that their rights under it are secured.

It appears to us that the Union's need for the names and addresses of the members of the unit it represents is far greater here than it was in *Standard Oil Company of California, W. O., Inc.* v. *N. L. R. B.*, 399 F. 2d 639 (1968), where the Ninth Circuit found a sufficient showing of necessity to require the employer to supply such information. In *Standard Oil,* the facts relevant to need bore similarity to those in the instant case except that the number of employees in the unit was much smaller (approximately 1,500 instead of 16,795), the geographic area encompassed by the unit was also comparatively insignificant (five or six counties in California rather than more than 34 states), the employees worked together in shops, and the turnover rate of employees was not extraordinary.

Prudential cautions us that if we sustain the Board's finding of need for the list on the record before us, we will in effect be sanctioning a *per se* rule that a union is always entitled to such information. We believe quite the contrary is true. In view of the unusual nature of this bargaining unit, a reversal of the Board's finding would be tantamount to a declaration that the information sought here cannot under any circumstances be necessary to a union, a result not even Prudential urges us to adopt.

B. *Relevance*

Prudential claims also that the Board erred as a matter of law in holding that the list of names and addresses of agents in the unit was relevant to the Union's fulfillment of its duties as their bargaining representative. It asserts that in truth the Union seeks this information in order that it may solicit new members within the unit.

We find no error in the Board's determination that the requested information was relevant. As the exclusive bargaining representative of all the agents within the unit, the Union has a statutory duty to represent fairly the interests of the more than 7,000 nonunion agents as well as the Union members. *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). *Standard Oil Company of California, W. O. Inc.* v. *N. L. R. B., supra.* This obligation, being coextensive with the sphere of activities of the exclusive bargaining representative, extends to the negotiation of new contracts and also to the administration of collective agreements already adopted. It seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts. Thus, a union must be able to inform the employees of its negotiations with the employer and obtain their views as to bargaining priorities in order that its position may reflect their wishes. Indeed, the information sought was particu-

larly relevant to the Union at the time of its last request, since it was then engaged in negotiating a new agreement with Prudential. Further, in order to administer an existing agreement effectively, a union must be able to apprise the employees of the benefits to which they are entitled under the contract and of its readiness to enforce compliance with the agreement for their protection.

We reject as legally untenable Prudential's contention that the Union is not entitled to a list of the names and addresses of the employees in the unit it represents unless it can establish that the information is relevant to a specific bargaining function. When a union requests information which is not ordinarily relevant to its performance as bargaining representative, but which is alleged to have become so because of peculiar circumstances, the courts have quite properly required a special showing of pertinence before obliging the employer to disclose. E.g., *N. L. R. B.* v. *Acme Industrial Co., supra* (information concerning the employer's movement of certain machinery out of its plant); *N. L. R. B.* v. *Truitt Mfg. Co., supra* (information concerning employer's profits); *Fafnir Bearing Co.* v. *N. L. R. B., supra* (independent union time study of company operations). Certain other types of information, such as wage data pertaining to the employees in the unit, is considered so central to the "core of the employer-employee relationship" that it has been held to be presumptively relevant. Although the ultimate standard of relevancy is the same in all cases, with regard to information of the wage data type, the employer bears the burden of showing a lack of relevance. *Curtiss-Wright Corp.* v. *N. L. R. B.*, 347 F. 2d 61, 68-69 (3d Cir. 1965); *International Tel. and Tel. Corp.* v. *N. L. R. B.*, 382 F. 2d 366 (3d Cir. 1967), cert. denied, 389 U.S. 1039 (1968); *Boston Herald-Traveler Corp.* v. *N. L. R. B.*, 223 F. 2d 58 (1st Cir. 1955).

The kind of information requested by the Union in this case has an even more fundamental relevance than that

considered presumptively relevant. The latter is needed by the union in order to bargain intelligently on specific issues of concern to the employees. But data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees. In this instance it is urgent so that the exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the union's statutory duties, we believe any special showing of specific relevance would be superfluous.

Prudential's complaint that the Union may use this information to solicit new members within the unit is simply of no moment. As the Board has so appropriately indicated, there is no clear distinction between informing non-member agents about the benefits it has obtained and hopes in the future to secure for them and its solicitation of their support. In any case, union solicitation is itself hardly an evil—especially where, as here, the union is already the exclusive bargaining representative of the employees it is soliciting. Moreover, the Supreme Court has upheld the propriety of a Board order requiring an employer to submit a list of the names and addresses of its employees eligible to vote in a representation election to facilitate solicitation by unions participating in the election. *N. L. R. B.* v. *Wyman-Gordon Company*, —— U.S. —— (April 23, 1969). And, the law is well established that where a stranger union has no adequate alternative means of reaching unrepresented employees it is attempting to organize, the employer must allow the union on the premises for solicitation purposes. E.g., *N. L. R. B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26 (2d Cir. 1967); see *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

It is clear to us that the Union here is on far stronger ground than in *Grossinger's*.

Lastly, we note that Prudential has little valid reason for opposing the Board's order. Supplying the requested list is hardly on onerous burden; it entails no such disruption of the employees' work as is ordinarily involved in allowing union organizers on the premises or permitting union experts to make a independent time study of the operations. In sum, we believe the immediate utility of this information to the Union clearly outweighs the minimal inconvenience to Prudential in having to supply it.

The petition for review is denied, and the cross application enforcement of the Board's order is granted.

FRIENDLY, *Circuit Judge* (dissenting):

If the real issue here were whether the Union needed help from Prudential in communicating with district agents concerning contract negotiations and administration, the Board's order might pass the substantial evidence test, although by the narrowest possible margin. While my brother KAUFMAN has put the case for the order as persuasively as anyone could, many doubts come to mind. The characterization of the Union as "relatively small" seems a curious description of a body having as members some 10,000 agents of Prudential[1] and thousands more of other insurance companies.[2] If the smallness relates to the Union's employment of "only ten full time organizers, all of whom have, since 1965, been engaged in activities

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[1] The figures in the opinion are the number of members who have consented to a check-off of union dues. The record does not disclose how many more agents are members.

[2] The General Counsel's brief on appeal indicates that in 1966 the Union's total membership amounted to four times its membership at Prudential.

unrelated to Prudential," that was the Union's choice, and I fail to see why it is entitled to special consideration on that account. The General Counsel's concern about the inadequacy of bulletin boards appears to be limited to offices with no Union members; he concedes that "in those offices where the Union does have members (and therefore a grievance committee), material posted on the bulletin board is sure to be read, and may be discussed during work breaks and at such outside meetings as the employees may wish to arrange."[3] Hence the Union can communicate via the bulletin boards with 68.4% of the nonmember agents and 87.6% of all agents. Again I see no warrant for accepting the Union's self-serving statement, not supported by the stipulation, that it is "unable" to establish grievance committees at any of the 221 district and detached offices where none of the agents has authorized a check-off. And these offices, it may be repeated, contain only 12.4% of the agents.

None of the foregoing is meant to indicate that the Union's means of communication with the nonmember agents were ideal. The law does not require that they should be. Even in the context of an organizing campaign, it is not an unfair labor practice for an employer to force union organizers to locate the employees and communicate with them without access to the employer's property or other help from him, *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), except when "the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," 351 U.S. at 113. That situation, which we found to exist with respect to the hotel employees in *NLRB* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26, 29-30 (2 Cir. 1967), is not present here where, as in

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[3] While the bulletin boards may not be used as a method for distributing material, they can readily be used to indicate where material can be obtained.

Babcock & Wilcox, "the usual methods of imparting information are available," 351 U.S. at 113, in addition to the special ones made available by the collective bargaining agreement. This court has held, in denying enforcement to a remedial order that a company furnish a list of employees and their addresses to a union, that the union's entitlement to such a list is governed by considerations similar to those governing non-employee access to an employer's property. *Textile Workers Union v. NLRB,* 388 F. 2d 896, 905-06 (1967); see *Decaturville Sportswear Co.* v. *NLRB,* 70 LRRM 2472 (6 Cir. 1969). Finally I cannot at all agree that this Union has anything like as persuasive a case as in *Standard Oil Company of California, W. O., Inc.* v. *NLRB,* 399 F. 2d 639 (9 Cir. 1968), where the union showed it needed the names and addresses to counter company propaganda that there was no "necessity for union organization and representation." Here there is no intimation that Prudential has practiced any anti-union activity.

The occasion for my dissent is that we engage in self-deception when we proceed on the basis that the Union's real objective is what its request of Prudential professed. There comes a point where we "should not be ignorant as judges of what we know as men." *Watts* v. *Indiana,* 338 U.S. 49, 52 (1949) (opinion of Mr. Justice Frankfurter). The Union wants the names and addresses of the agents not to poll them about contract proposals or to service their grievances but to engage in active solicitation of membership. Three facts suffice to establish this. One is the absence of any evidence that in the entire period since 1959 when the Union became the representative of the Prudential agents, it has ever consulted its members or the approximately 150 nonmembers whose names and addresses it has, with respect to contract proposals;[4] indeed

[4] Although the Union has taken strike votes and has had its contracts ratified, the Union Constitution allows only members to vote on these subjects and the actions have been taken at Union meetings.

the stipulation indicates that the Union communicates to its members by mail only about twice a year, except for sending them its monthly publication "The Insurance Worker." The second is the manner in which the Union conducted its campaigns in 1964-66 to obtain nonmember names and addresses through its members. Its communications with district and detached Union officials and its coverage of the campaigns in The Insurance Worker stated explicitly that the reason the Union desired the names was to facilitate recruitment of new members among the employees in the unit. The third is the out-of-hand rejection by the Board and the Union of Prudential's suggestion that if the Union's need is what it and the Board claimed, the order should be appropriately limited to the kinds of communication to which the Union's request referred.

Of course, the Union's desire to increase its rather low proportion of members is an entirely worthy one. But I do not understand Prudential to be required to assist the Union in achieving that goal by making an exception to its stipulated "policy and practice . . . to refuse to disclose or supply a list of names and addresses of District Agents to any organization seeking such a list for any purpose." Cf. *The Little Rock Downtowner, Inc.*, 145 N.L.R.B. 1286, 1308-09 (1964), enforced as modified, 341 F. 2d 1020 (8 Cir. 1965). The Board order recently sustained in *NLRB* v. *Wyman-Gordon Co.*, —— U.S. ——, 37 L.W. 4370 (1969), was based on the Board's power, under § 9 of the National Labor Relations Act, to conduct representation elections; nothing in that case or in the Board's *Excelsior* "rule" indicates that it is an unfair labor practice for an employer to decline to help a certified union increase its membership by handing over the names and addresses of employees.

At minimum I would therefore remand this case for explanation why an order limited as Prudential suggests

would not meet any legitimate union needs. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 193-97 (1941), amply justifies this. I would also direct the Board to explain why, in order to effectuate the purposes and policies of the Act, it is necessary that Prudential be required to turn over the names and addresses of nonmember agents rather than simply mail Union communications to them at the Union's request and expense. Congress has deemed such a procedure satisfactory for union elections, Labor-Management Reporting and Disclosure Act of 1959, § 401(c), and this has long constituted the limit of the federally imposed duty of a corporation involved in a proxy contest. SEC Rule 14a-7.

There is still another subject I would ask the Board to consider on remand. While we are told that this case represents a unique situation, other unions are not likely to find it so. The Board is thus involving itself and reviewing courts in a mass of new litigation which will add to the delays that have unfortunately marred its administration of a statute under which speed is particularly important. See, e.g., *Bryant Chucking Grinder Co.* v. *NLRB*, 389 F. 2d 565, 572 (2 Cir. 1967) (dissenting opinion of Judge Anderson), cert. denied, 392 U.S. 908 (1968); *NLRB* v. *World Carpets of New York, Inc.*, 403 F. 2d 408 (2 Cir. 1968). Now that the Supreme Court has taken note of the mounting criticisms of the Board for failure to utilize the rule-making procedures of the APA, see *NLRB* v. *Wyman-Gordon Co.*, —— U.S. at —— fn. 3 (plurality opinion of Mr. Justice Fortas),[5] will not the

[5] In addition to the criticisms there cited, see *NLRB* v. *A. P. W. Prods. Co.*, 316 F. 2d 899, 904-06 (2 Cir. 1963); *Operating Engineers Local 49* v. *NLRB*, 353 F. 2d 852, 856 (D. C. Cir. 1965); *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854, 859-61 (2 Cir. 1966); *NLRB* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57 (2 Cir. 1967); *McLeod* v. *General Elec. Co.*, 257 F. Supp. 690, 708 n. 14 (S. D. N. Y. 1966); Peck, A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making, 117 U. Pa. L. Rev. 254 (1968).

Board, at long last, recognize the desirability of proceeding in that manner in a new field that cries for such treatment, rather than continue in the painful and time-consuming task of individual adjudication?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 32936, 33069

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Judgment

Before: Friendly, Kaufman, and Hays, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of The Prudential Insurance Company of America, to review and set aside a certain order of the National Labor Relations Board issued against petitioner on November 13, 1968, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on April 10, 1969, and has considered the briefs and the transcript filed in this cause. On May 2, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order as modified by stipulation signed by all parties hereto and filed with the Court on February 25, 1969.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that The Prudential Insurance Company of America, its officers, agents, suc-

cessors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

IRVING R. KAUFMAN
Judge, United States Court of Appeals for the Second Circuit

PAUL R. HAYS
Judge, United States Court of Appeals for the Second Circuit

FILED: May 28, 1969.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 511

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-35a) is not yet officially reported. The Board's decision and order (Pet. App. 1a-14a) are reported at 173 NLRB No. 117.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1969 (Pet. App. 35a-36a).[1] The petition

[1] On July 4, 1969, Mr. Justice Harlan denied petitioner's application for a stay of the judgment pending the filing and final determination of a petition for a writ of certiorari.

for a writ of certiorari was filed on August 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that the Company violated its bargaining obligation under the National Labor Relations Act by refusing to furnish the Union with the names and addresses of the non-union employees in the bargaining unit which it represents.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition (p. 2).

STATEMENT

Since 1959, petitioner Company has recognized the Insurance Workers International Union, AFL-CIO [2] as the exclusive bargaining representative of its district insurance agents in 34 States, the District of Columbia, and the City of Toledo, Ohio. During this period, the parties have entered into successive collective bargaining agreements, the most recent of which is effective until September 29, 1969 (Pet.

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[2] The Union was the charging party before the Board and intervened in the court of appeals proceeding; it is thus a party here.

App. 4a; A. 10).[3] The bargaining unit represented by the Union covers approximately 16,795 agents employed in 478 district offices and 419 detached offices (Pet. App. 4a; A. 13-14).[4] Approximately 90 percent of these agents are required by the Company to report to the office to which they are assigned twice a week to attend meetings; the remainder report less frequently because of traveling difficulties. The agents spend the rest of their time working indivdually in the field (Pet. App. 8a, n. 8; A. 19-20).

Approximately 9,702 of the agents in the unit have executed dues checkoff authorizations in favor of the Union.[5] There are no checkoff authorizations in effect at 221 of the Company's offices, to which approximately 2,243 district agents are assigned (Pet. App. 4a; A. 14-15). During 1967, the Company hired 4,315 new agents, while 4,241 agents were either terminated or voluntarily left its employ. During the same period, 2,455 new checkoff authorizations were executed, while 2,352 were cancelled as a result of transfers, terminations, or voluntary revocations. (Pet. App. 5a; A 15-16.)

The Union has mailing lists which include all agents within the unit who have executed dues check-

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[3] "A." refers to the Appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[4] A detached office is administratively related to a particular district office (A. 13-14).

[5] The collective bargaining agreements have provided for the checkoff of union dues, but have not contained union security or maintenance of membership provisions (Pet. App. 4a; A. 12).

off authorizations;[6] in addition to mailing them its monthly newspaper, it communicates with these employees by letter approximately twice a year (A. 21, 23). Through its own efforts, the Union has also obtained the names and home addresses of about 150 non-members employed within the unit (Pet. App. 5a, n. 4; A. 23). It has no record, however, of the names or addresses of the roughly 7,000 other unit employees who are not Union members (Pet. App. 5a; A. 23).

At various times since its selection in 1959, the Union has orally requested the Company to supply it with a list of the names and addresses of the non-union employees in the unit (Pet. App. 5a, n. 3; A. 12). In 1960, it submitted a similar request in writing, explaining: "Such a list is necessary to enable us to accomplish effectively our responsibilities as the bargaining agent, and to bargain effectively for our next contract. There is no practicable way to communicate with these employees other than by mail, because of the geographical expanse of the collective bargaining unit" (A. 12, 31-32). Each of these requests was denied by the Company (A. 12).

On August 23, 1967, during the negotiations which resulted in the current collective bargaining agreement, the Union wrote the Company again requesting that it furnish such a list, pointing out that the

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[6] The Company supplies the Union with a monthly statement of the names and office location of employees who have been added to or deleted from the Company's checkoff authorization list, and also with a similar semi-annual report (Pet. App. 5a; A. 17).

information it would contain was "necessary and relevant to the Union's performance and fulfillment of its statutory functions and duties as collective bargaining representative of all the employees" (A. 29). The letter added that (A. 30):

> * * * [W]ithout such a list, the Union cannot advise all Agents covered by the Agreement as to the benefits offered by the Agreement, cannot gain from them the information and participation necessary and relevant to police and enforce the Agreement throughout the unit or the adherence and support necessary for their representation, or, in general, cannot in any effective manner communicate with the District Agents who are the beneficiaries of its statutory obligations as collective bargaining representative.
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> * * * [T]his information is, additionally, required and relevant at the present time, when the Union is engaged in collective bargaining with the Company for a new Agreement; and should thus be in a position to inform all the employees represented by it and governed by the Agreement as to the course of the negotiations, and to solicit their understanding and participation in the bargaining process, including their well informed consideration and action upon any proposed new Agreement. * * *

The Company again refused the Union's request, claiming that its policy was not to disclose such information to any organization for any purpose (Pet. App. 6a; A. 12, 21). The Union then filed unfair labor practice charges with the Board, and a com-

plaint issued alleging that the Company's refusal to furnish the information violated Section 8(a)(5) and (1) of the Act (Pet. App. 2a).

On these facts, the Board concluded that the Company's furnishing of the names and addresses of the unit employees to the Union "was necessary and relevant to collective bargaining and the administration of the collective-bargaining agreement" (Pet. App. 6a). In this regard, it found that the Union had advised the Company that "it intended to use this information in order to solicit the employees' views on contract proposals and preferences, inform the employees concerning contract benefits, and encourage employee participation in the policing and enforcing of the collective-bargaining agreement," and that "such purposes must be considered relevant to collective bargaining and to the administration of the collective-bargaining agreement" (Pet. App. 9a).[7] The Board further found the Union lacked any effective means of communicating with non-union unit employees, rejecting the Company's contention that adequate channels of communication were provided by the existing collective bargaining agreement (Pet. App. 7a-8a).[8] Accordingly, it held that the Company

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[7] The Board added: "While we do not dispute the fact that the Union may also use the information obtained for the purpose of recruiting new members, this in no way detracts from our finding that the information is necessary and relevant for the purposes of collective bargaining and the administration of the collective-bargaining agreement" (Pet. App. 9a, n. 11).

[8] Under Article XXIII of the collective bargaining agreement, the Union may maintain a grievance committee in each district (Pet. App. 7a; A. 13, 26-29). The Union has estab-

violated Section 8(a)(5) and (1) of the Act by refusing, on and after August 27, 1967, to furnish the Union with a list of the names and addresses of all bargaining unit employees (Pet. App. 9a).

The Board ordered the Company to cease and desist from the unfair labor practice found, to provide the Union, upon request, with a list of the names and addresses of all employees in the unit, and to notify the Union at periodic intervals of any changes in the information listed (Pet. App. 11a-14a).

On appeal, the court of appeals, with one judge dissenting, sustained the Board's findings as to the relevance of the information sought by the Union and its need therefor, and enforced the Board's order (Pet. App. 15a-30a).[9]

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lished a grievance committee at all offices except the 221 at which no Union members are employed (Pet. App. 7a, n. 6; A. 17). However, there is no contractual authorization for contact between the grievance committee and employees except where such contact is incident to the processing of a grievance (Pet. App. 7a; A. 26-29).

Under Article XVIII of the agreement, the Union is permitted to maintain a bulletin board in each of the Company's local offices and to *post* certain types of notices thereon. However, this provision imposes restrictions upon the content of the notices which may be posted, and it reserves to the Company the right to remove any materials which are not authorized. Moreover, the provision expressly prohibits the Union from using the bulletin boards to *distribute* materials of any kind (Pet. App. 8a; A. 25-26.)

[9] Judge Friendly dissented because, in his view, the record did not support the Board's finding, sustained by the majority of the court, that the Union needed the names and addresses to discharge its collective bargaining function (Pet. App. 30a, 32a).

ARGUMENT

1. The basic question which petitioner seeks to raise—whether an employer's duty to bargain includes "an obligation to provide an incumbent union with a list of home addresses of nonmembers of the union for use by the union for organizational purposes in order to enhance the union's bargaining power" (Pet. 2)—is not presented on this record. The Board found, and the court of appeals sustained its findings, that the Union requested this information because it lacked "an effective means of communication with employees," and that it intended to use it "in order to solicit the employees' views on contract proposals and preferences, inform the employees concerning contract benefits, and encourage employee participation in the policing and enforcing of the collective-bargaining agreement" (Pet. App. 9a). Since collective bargaining and the administration of the agreement in effect are clearly the legitimate function of a bargaining representative,[10] and "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties" (*National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 435-

[10] Indeed, as the court below noted (Pet. App. 29a), "data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees."

436),[11] the only issue actually presented is whether there is substantial evidence to support the Board's findings that the Union needed, and intended to use, the information for such purposes. That issue is not one warranting further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

Moreover, the Board's findings were fully justified in view of, *inter alia*, the size of the bargaining unit represented by the Union, the wide geographic dispersion of the members of the unit, the high rate of turnover of employees and Union members, the employees' infrequent contacts with the district offices, and the fact that, at the time of its last request, the Union was then engaged in negotiating a new contract with the Company (*supra*, pp. 2-5).[12] That the Union may also use the information obtained for the purpose of attempting to enlist new members does not require a different conclusion. As the court below pointed out (Pet. App. 29a), there is no necessary inconsistency "between [a union's] informing non-member agents about the benefits it has

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[11] In the light of this decision, which petitioner overlooks, there is plainly no substance to its contention (Pet. 15-16) that the court below has unduly extended the "presumption of relevance."

[12] Contrary to petitioner (Pet. 18-20), the court below did not depart from the standard for determining the adequacy of alternative channels of communication enunciated in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, but merely found that, on the special facts of this case, those channels were not adequate here (see Pet. App. 22a-27a).

obtained and hopes in the future to secure for them and its solicitation of their support." In *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 675-676, this Court itself pointed out "the union is a service agency that probably encourages membership whenever it does its job well."

2. There is no conflict of decisions. The only other court of appeals which has considered a situation similar to that here reached the same conclusion as did the court below. *Standard Oil Company of California* v. *National Labor Relations Board*, 399 F. 2d 639 (C.A. 9). See also *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, sustaining the propriety of a Board requirement that the employer submit a list of the names and addresses of its employees eligible to vote in a representation election to the unions participating in the election. From the holding in *Wyman-Gordon* it would appear to follow *a fortiori* that a union already "the exclusive bargaining representative of the employees" is entitled to this information so that it "may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests" (Pet. App. 29a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 362955 177

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CL

No. 511

Supreme Court of the United States

OCTOBER TERM, 1969

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, *Respondents.*

BRIEF FOR RESPONDENT INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



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BRIEF FOR RESPONDENT INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO IN OPPOSITION

COUNTERSTATEMENT OF QUESTION PRESENTED

The only question presented herein is whether there was sufficient evidence on this particular record, considered as a whole, to support the decision of the Respondent National Labor Relations Board ("Board") that, under the circumstances shown in this case, Petitioner, The Prudential Insurance Company of Amer-

ica, violated its duties under the National Labor Relations Act by refusing, upon request, to provide the names and addresses of its employees in the bargaining unit to the collective bargaining representative of the employees in that unit, Respondent Insurance Workers International Union, AFL-CIO ("Union").

The principal Questions Presented recited in the Petition are not in fact presented in this case. Petitioner's assertion in its first Question that this case involves "an obligation to provide an incumbent union with a list of home addresses of nonmembers of the union *for use by the union for organizational purposes in order to enhance the union's bargaining power*" (Pet. 2, emphasis added), as well as its second Question, which is on its face limited to "*such* a list of home addresses" (*id.* at 3, emphasis added), is contrary to the plain facts: the Union requested the list of names and addresses as necessary for it properly to perform its duties as the collective bargaining representative, for purposes of both contract administration and negotiations for a new contract; the Board unanimously found that the information was necessary for use by the Union as the collective bargaining representative; and the Court below read the record identically and affirmed the Board on that basis. Both the Board and the Court did not see the issues in the case as those now presented by Petitioner in its Questions 1 and 2. Manifestly, neither the Board nor the Court considered, let alone decided, the principal Questions Presented by Petitioner. Indeed, Petitioner itself, in its third Question, acknowledges that the Court below was concerned with the Union's channel "of communicating with nonmembers about collective bargaining or contract administration matters" (Pet. 3).

STATEMENT OF THE CASE

There is an additional page to be added to the history of the case as recited in the Petition. Subsequent to the decision of the Court below, Petitioner moved in that Court to be relieved from the mandate's taking effect immediately. On June 23, 1969, that Court denied Petitioner's motion. Thereupon Petitioner applied to Mr. Justice Harlan for a stay. On July 4, 1969, Mr. Justice Harlan denied a stay, finding "No sufficient reason for disturbing the Court of Appeals' denial of a stay."

In addition to the foregoing, some amplifications and clarifications of the facts as stated in the Petition are in order. The perspective of realism should be sharpened, in relation to the resources available to the Union and the nature of the debit insurance agent's work, the work of the employees involved in this case.

The Union has relatively small membership and quite limited resources. Its total membership—nationwide, all companies—is less than 24,000. As the record shows, it has few full-time employees, and only ten full-time organizers; again it merits emphasis that this is a total figure, for the entire nation and for all companies. Moreover, with few exceptions, Local Union officers and members are working insurance agents, who must perform the duties of their job to make a living. The very nature of those duties in this bargaining unit as well as generally requires personal, case-by-case dealing and transactions between the agent and the actual and prospective policyholders of the agent's employer. Consequently, the agents for the most part are working by themselves, out of immediate, plant-like contact with their fellow

employees. As the Board found, as one significant facet of the realities of this case, "the nature of an agent's duties is such that only a very small percentage of his time is spent in the office" (Pet. 8a; see also *id.* at n. 8).

It is during this limited time in the office that the grievance committees, which are composed of working agents and not Union employees, perform the grievance processing functions that are defined and circumscribed exclusively by the collective bargaining Agreement. Because of the conferences and reviews with Petitioner Company provided in the Agreement, a single grievance may consume the time of the grievance committee on four or more reporting days, in addition to the time and attention which the committee must also devote to discussions with the aggrieved agent. Manifestly, the picture which Petitioner strives to paint of the Union, the grievance committees and the entire record is one which is overly impressionistic, unrelated to the realities which appear of record and which the Board and the Court saw and considered in correct and *a fortiori* permissible focus.

ARGUMENT

This Petition should be denied. Petitioner has proffered no reason for a grant. There is no conflict; indeed, the only directly relevant Court of Appeals decision is consistent with the decision below. There is no question presented which is of general importance. In any event, the decisions of the Board and the Court of Appeals are manifestly correct.

1. Petitioner has the temerity to assert that this case "presents to this Court a conflict of substantial importance" (Pet. 17), without mentioning *Standard*

Oil of California v. *N.L.R.B.*, 399 F.2d 638 (9 Cir. 1968), the only other Court of Appeals decision which concerned a Board Order requiring an employer to provide the names and addresses of the employees in the bargaining unit, upon request, to the collective bargaining representative in that unit. Under the circumstances shown in that case, the Board had found that such a list should be provided (166 NLRB No. 45), and the Ninth Circuit unanimously enforced the Board Order. Far from there being any conflict, that decision is in perfect harmony with this decision, in terms both of its rationale and its result. The rationale of the Ninth Circuit was identical to that of the Court below, and proceeded in terms of an analysis and appraisal of the facts of the particular record.* The result in the Ninth Circuit case was identical to that below, an affirmance of the Board finding that upon the particular record the employer was guilty of an unfair labor practice, and enforcement of the Board Order directing the employer to provide the collective bargaining representative with the particular list.

2. The Petition itself does not even attempt any showing of general importance. Its substance is spent exclusively upon attempting to demonstrate that the Board and the Court were in error in their decision in this particular case. While even that effort is unsuccessful, the attention of this Court would not be merited even if error were shown. For "this Court does not sit for the benefit of the particular litigants * * * [nor to consider] the academic or the episodic."

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* Demonstrating the Board's case-by-case approach is the fact that Member Zagoria dissented in *Standard Oil* "based on the particular facts there presented", but joined in finding a violation in this case on the basis of the facts presented here (Pet. 6a, n. 5).

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

Far from showing that this case involves real and recurrent problems of general importance, Petitioner cites no other cases in which the question has arisen of an employer's refusal to provide the bargaining representative with a list of the names and addresses of the employees in the bargaining unit. In fact, as we have seen, there is one other Court of Appeals decision on this question, a decision consistent with that of the Court below. The fact that only two cases have arisen since the Act became law in 1935 demonstrates there is here no question of general importance, particularly when the cases reflect identical approaches and judgments.

This case was decided on the basis of its own facts. Both the Board and the Court considered and decided it as turning on findings of fact. Both regarded this as an ordinary, run-of-the-mill case of refusal to bargain, involving the application of familiar and broad legal concepts to the particular facts. It bears reiteration that neither saw the case as presenting novel or difficult questions of law; they were both concerned with the unique facts of this case; and, indeed, even the Statement in the Petition (pp. 3-10) demonstrates how unique, how remote from any typical or common industrial relations picture, this case is. There is nothing in this unique setting justifying the attention of this Court.

3. Although this case is not worthy of review by this Court for the reasons discussed above, which are independent of the correctness of the decision of the Court of Appeals, we respectfully submit that its opinion

(Pet. 16a-30a) demonstrates that the correct conclusion was reached, and via correct legal reasoning. Indeed, the Petition does not assay any analysis of or attack upon the opinion as it actually reads; but rather, as we have seen, the Petition is quixotically addressed to questions created by Petitioner and not considered or decided by the Court.

In discussing the questions it poses, Petitioner is concerned only with a two-party relationship, that between the employer and the Union, disregarding entirely the employees themselves. But their rights under the Act to take concerted and collective action (or to refrain therefrom) are pertinent if not decisive. One example of Petitioner's myopia will suffice to make the point. *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), is referred to as involving "use of an employer's property by a union", with only incidental recognition that it insures "that the employees may exercise a fair, free and informed choice in their selection of a bargaining representative" (Pet. 12). Petitioner accepts *Wyman-Gordon* as correct, as indeed it must, but seeks to distinguish that case as involving "a union *seeking* representative status" (*ibid.;* emphasis in original). The invalidity of that distinction demonstrates the error in Petitioner's entire view. For employees have no less right to a "fair, free and informed choice" after an election than before. The subjects of choice are different, to be sure, whether or not to participate in collective action, in particular whether or not to join the Union, rather than whether or not to vote for the Union. But the right to a fair, free and informed choice is the same, and the corresponding right to be informed by both sides is the same. The individual employee has the identical need for the facts lest his exercise of statu-

tory rights be effectively denied or infringed by sheer ignorance, during the collective bargaining and the administration of collective bargaining contracts as during the election campaign. Accordingly, the distinction Petitioner imports to complain of the result below is utterly invalid.

The result below is in accordance with the Act and the judgment below is eminently correct. There is no conflict; the decision is in harmony with the only other Court of Appeals decision directly in point. There is no issue of general importance; the questions discussed by Petitioner are not presented and were not considered by the Board or the Court of Appeals; the case turns on its own special facts.

CONCLUSION

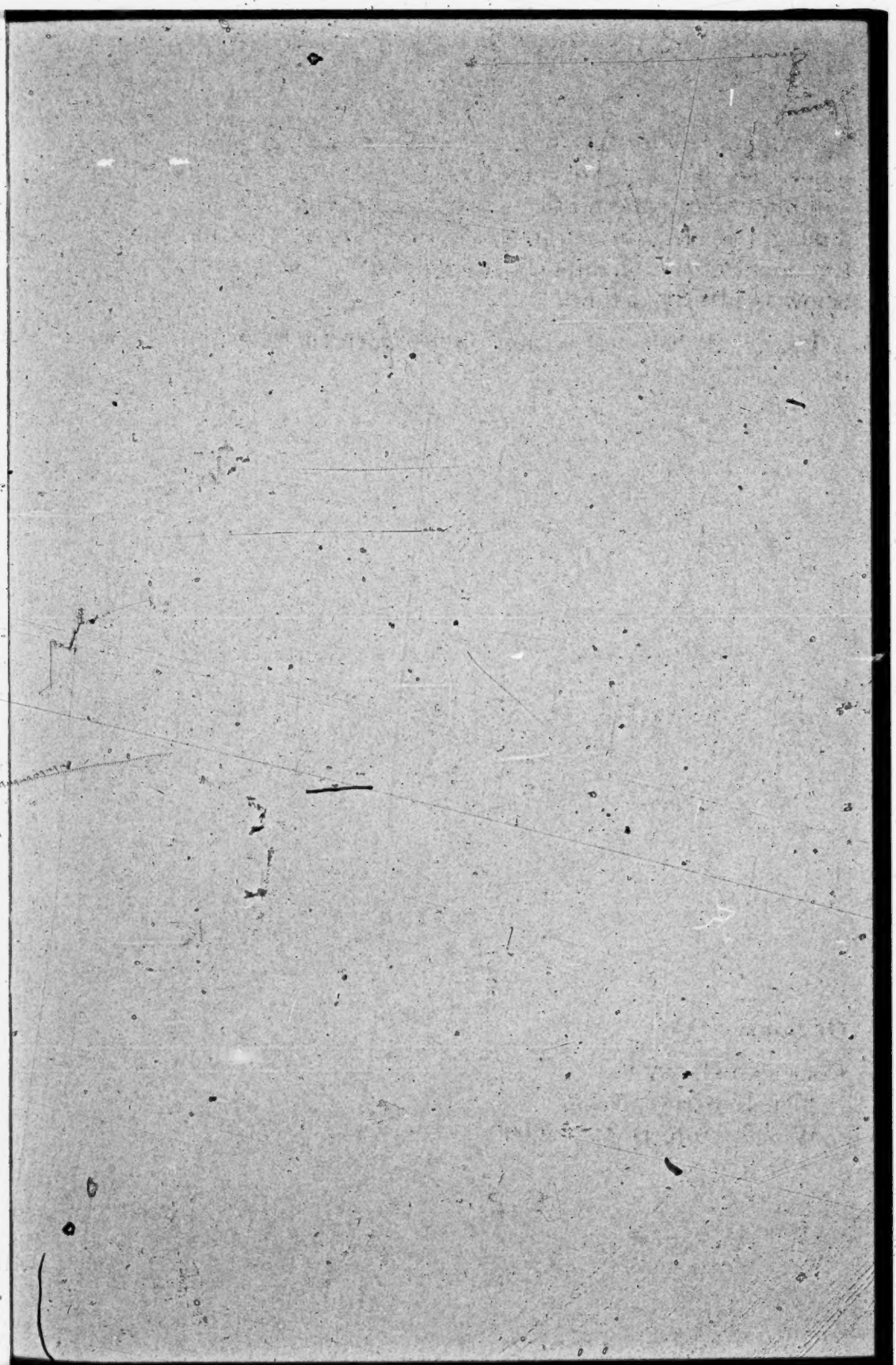
For the reasons stated herein, this Petition should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The Board says that the principal question presented by petitioner Prudential is not presented on the record. There is no substance to this assertion.

The principal question is whether an employer can be made to provide an incumbent union with a list of the home addresses of nonmembers of the union in

order to assist the union to expand its membership and thus enhance its bargaining power.

Prudential maintained throughout the proceeding that the Union wanted the list of addresses so that it could solicit the nonmembers on the list for membership. The Board "did not dispute the fact" that the list might be used for recruiting. The Court of Appeals was unconcerned that the list would be so used. (Pet. App. 9a n.11, 29a).

The professed purpose of the Union in seeking the list was to communicate with employees about contract negotiations and contract administration, Prudential proposed that, at the very least, the Board's order be limited in such a way that the list could be used only for communications about contract negotiation and contract administration. The court rejected the proposal, and, Judge Friendly, dissenting below, referred to "the out-of-hand rejection by the Board and the Union" of Prudential's suggestion. He would have remanded the case to obtain an explanation from the Board "why an order limited as Prudential suggests would not meet any legitimate union needs." (Pet. App. 33a-34a).

The court below has thus granted enforcement of a Board order that compels an employer to turn over to an incumbent union names and addresses of nonmembers of the union that can and likely will be used to solicit their membership. It has done so even though it was urged to render a judgment that would not have compelled this result.

The case is thus no different from, for example, a case of wrongful death in which judgment was for $10,000 for loss of expectancy and $5,000 for pain and

suffering and an intermediate appellate court, saying it was immaterial that damages for pain and suffering were included, declined to reduce the judgment to $10,000. In such a case, there can be no doubt that the intermediate appellate court's judgment would pose for the highest appellate court the question whether the law allowed recovery for pain and suffering in a wrongful death case. By the same token, it cannot be denied that there is presented in this case the important, novel question whether an employer can be required to help an employee organization in the way in which Prudential has been ordered by the Board and the Court of Appeals to help the Union.

II

The question is both novel and important. It is no answer to say, as the court below said in language now quoted by the Board, that "there is no clear distinction between informing non-member agents about the benefits . . . [a union] has obtained and hopes in the future to secure for them and its solicitation of their support." (Pet. App. 29a; NLRB Br. in Opp. 9-10). Prudential's objection is not that in communications between the Union and nonmembers of the Union about contract negotiations and administration the Union might engage in some puffing so that the communications might have an incidental effect upon the nonmembers' attitude toward the Union. Bearing in mind that in the past the Union has not communicated about contract matters with its members or the nonmembers whose addresses it has, Prudential is concerned over the use of the list for out-and-out recruitment of new members. Surely such use of the list would not be beyond perception.

There is no decision of this Court or of any court of appeals under which an employer is required to turn over to a union a nonmember employee address list for that purpose. The question should be resolved by this Court.

Respectfully submitted,

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OCTOBER 1969